# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES

MID-WEST TELEPHONE SERVICE, INC.

and Cases 08-CA-038901 08-CA-039168

08-CA-039168 08-CA-039297 08-CA-039398 08-CA-039334

WILFREDO PLACERES, DUSTIN PORTER, BEN FANNIN and MICHAEL WILLIAMS

Melanie Bordelois, Esq., for the Acting General Counsel. Hans Nilges, Esq., for the Respondent.

### SUPPLEMENTAL DECISION AND ORDER

MARK CARISSIMI, Administrative Law Judge. This is a Supplemental Decision and Order regarding an application for an award of allowable fees and expenses pursuant to the Equal Access to Justice Act (EAJA), Pub. L 96-481, 94 Stat. 2325 and Section 102.143 of the Rules and Regulations of the National Labor Relations Board (the Board) filed by Mid-West Telephone Service, Inc. (the Respondent).

#### Statement of the Case

On September 21, 2012, the Board issued a Decision and Order<sup>1</sup> in this proceeding finding that the Respondent committed violations of Section 8(a)(4), (3), and (1) of the Act. In its decision, at footnote 1, the Board noted that no exceptions were filed to my dismissal of certain allegations of the complaint, including the allegation that the Respondent violated the Act by discharging employee Wilfredo Placeres.<sup>2</sup>

<sup>&</sup>lt;sup>1</sup> 358 NLRB No. 145.

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<sup>&</sup>lt;sup>2</sup> On December 10, 2012, the Board issued an unpublished order denying the Respondent's motion for reconsideration regarding my finding that the Respondent violated Section 8(a)(4) of the Act by discharging employee Ben Fannin.

On October 19, 2012, the Respondent filed with the Board its EAJA application in the instant case. On November 15, 2012, the Acting General Counsel filed a motion to dismiss the Respondent's application and a supporting brief. On December 6, 2012, the Respondent filed a brief in opposition to the Acting General Counsel's motion to dismiss its EAJA application. On December 14, 2012, the Respondent filed a petition for an amendment of Section 102.145 of the Board's Rules and Regulations to increase its attorneys' fees. On January 7, 2013, the Acting General Counsel filed a response to the Respondent's petition for an amendment. On January 17, 2013, the Board issued an order referring the Respondent's EAJA application to me for appropriate action.

On the basis of the entire record, including the briefs filed by the Respondent and the Acting General Counsel, I deny the Respondent's application because I find that the Acting General Counsel was substantially justified in litigating the allegation in question.

## The Respondent's Application

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EAJA and Section 102.143 of the Board's Rules and Regulations set forth the eligibility requirements under the statute. A corporation which has a net worth exceeding \$7 million or which has more than 500 employees is ineligible to seek to recover attorneys' fees under EAJA. Attached to its application, the Respondent has submitted documents which I find meet the threshold eligibility requirements to receive an award under EAJA

In its application, the Respondent seeks an award of attorney's fees under EAJA only with respect to the dismissed complaint allegation regarding the discharge of employee Wilfredo Placeres. The consolidated complaint which issued in the underlying unfair labor practice proceeding alleged that Placeres was discharged in violation of Section 8(a)(3) and (1) on April 13, 2010. The Respondent notes that after it had discussions with Regional Office personnel and Placeres, it agreed to reinstate him if he would withdraw the charge that he filed in 08-CA-038901. On April 8, 2011, the Respondent reinstated Placeres to his former position and on July 26, 2011, Placeres submitted a withdrawal request in 08-CA-038901. The Regional Director, however, refused to approve the withdrawal request. Accordingly, counsel for the Acting General Counsel continued to prosecute the complaint allegations regarding the discharge of Placeres at the hearing held on October 11-13, 2011. On December 28, 2011, I issued a decision dismissing the complaint allegation regarding the discharge of Placeres based on the non-Board settlement between Placeres and the Respondent. The Acting General Counsel did not file exceptions to the dismissal of this complaint allegation.

The Respondent contends that it is the prevailing party regarding the dismissal of the complaint allegation regarding the discharge of Placeres. It further contends that the Acting General Counsel was not substantially justified in refusing to approve the withdrawal request of Placeres and litigating his allegedly unlawful discharge.

Attached to its application, the Respondent submitted a statement of attorneys' fees. The statement does not specifically itemize the amount of time spent in defending the complaint allegations regarding the discharge of Placeres. Since this allegation was consolidated with charges filed by three other employees, the Respondent divided the total number of hours its attorneys had devoted to defending this case by four and multiplied that figure by \$125 an hour.

The Respondent claims that it is entitled to an award of attorneys' fees in the amount of \$9427 in defending the allegations of the complaint regarding the discharge of Placeres. It also claims an additional amount of \$987.50 for preparing the instant EAJA application.

#### The Acting General Counsel's Motion to Dismiss

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The Acting General Counsel first argues that the Respondent is not a prevailing party in a significant and discrete portion of the unfair labor practice proceeding within the meaning of the EAJA and the Board's Rules and Regulations, Section 102.143(b). In support of this position, the Acting General Counsel notes that the Board has held that when the General Counsel withdraws a complaint pursuant to a settlement agreement between the parties a respondent does not become a prevailing party. *National Electrical Contractors Assn.*, *Birmingham Chapter*, 313 NLRB 770 (1994); *Dame & Sons Construction Co.*, 292 NLRB 1044, 1045 (1989); *Carthage Heating Co.*, 273 NLRB 120, 122-123 (1984). The Acting General Counsel claims that my decision to dismiss the complaint allegation regarding the discharge of Placeres is of a similar vein because it was based on a private settlement agreement between the Respondent and Placeres. The Acting General Counsel notes that Placeres was reinstated with a written guarantee that the Respondent would not enforce a previously executed noncompetition agreement. The Acting General Counsel argues that the Respondent would not have had to take any of those actions if the complaint allegation regarding Placeres' termination had been dismissed on the merits and therefore the Respondent was not a prevailing party in the underlying proceeding.

The Acting General Counsel further contends that if I find that the Respondent is a prevailing party, the Acting General Counsel was substantially justified in not approving the proffered withdrawal request and litigating the complaint allegation regarding the discharge of Placeres.

The Acting General Counsel also contends that the Respondent's application should be dismissed because it does not identify or adequately document the fees and expenses of the Respondent's attorneys in connection with the litigation of the complaint allegations regarding the discharge of Placeres. Finally, the Acting General Counsel contends that the application should be dismissed because the Respondent did not initially serve the Charging Parties with a copy of its application.<sup>3</sup>

### **Analysis and Conclusions**

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## The Applicant's Status as a Prevailing Party

Section 102.143(b) of the Board's Rules and Regulations provides that:

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A respondent in an adversary adjudication who prevails in that proceeding, or in a significant and discrete substantive portion of that proceeding, and who otherwise meets the eligibility requirements of this section is eligible to apply for an award

<sup>&</sup>lt;sup>3</sup> The Respondent admits that the Charging Parties were not initially served with its application but asserts they were properly served on November 19, 2012.

of fees and other expenses allowable under the provisions of section 102.145 of these rules

As noted above, the Respondent contends that it is the prevailing party regarding the dismissal of the complaint allegation regarding the discharge of Placeres. The Acting General Counsel argues that the Respondent is not a prevailing party within the meaning of the Board's Rules and Regulations because the dismissal of the complaint allegation regarding Placeres' discharge was based upon my approval of the private settlement agreement between the Respondent and Placeres and not upon the underlying merits.<sup>4</sup>

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I approved the withdrawal request of Placeres over the objection of the Acting General Counsel and after the circumstances of Placeres' discharge and the non-Board settlement between Placeres and the Respondent were fully litigated and briefed. In the cases relied on by the Acting General Counsel, the General Counsel voluntarily withdrew a complaint after the private parties had entered into a non-Board adjustment of the underlying dispute. In the instant case, the Acting General Counsel refused to approve the withdrawal request of Placeres and litigated the complaint allegation regarding his allegedly unlawful termination until I issued my decision in the underlying case. Included in this litigation was the question of whether it was appropriate for me to approve Placeres' withdrawal request based upon the non-Board settlement between the Respondent and Placeres. At the hearing, the Respondent produced evidence regarding both the underlying facts regarding Placeres' discharge and the circumstances surrounding his withdrawal of the charge. The posthearing briefs filed by the Acting General Counsel and the Respondent addressed both the circumstances surrounding Placeres' allegedly unlawful discharge and the issue of whether it was appropriate for me to approve Placeres' withdrawal request over the Acting General Counsel's objection. In their briefs, both parties addressed Independent Stave Co., 287 NLRB 740 (1987), the Board's seminal decision regarding the factors used to determine whether it is appropriate to approve a non-Board settlement. After considering all the facts and applying the factors set forth in *Independent Stave*, I concluded, in agreement with the Respondent's position, that it was appropriate to approve Placeres' withdrawal of the portion of his charge relating to his discharge and dismissed the complaint allegation that he was discharged in violation of Section 8(a)(3) and (1) of the Act on that basis.

The Acting General Counsel's refusal to withdraw the complaint allegation regarding Placeres based on the non-Board settlement distinguishes the instant case from those relied on by the Acting General Counsel in support of his position. In the instant case, the Acting General Counsel actively opposed the approval of the non-Board settlement and it required a judicial finding to resolve the issue and impose the non-Board settlement.

In *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001), the the Supreme Court held that in order to be awarded attorney's fees under the Fair Housing Amendments Act (FHAA) and the Americans with Disabilities Act (ADA) a party had to either secure a judgment on the merits or a court ordered consent decree in order to qualify as a "prevailing party." In its decision, the Court noted that *Blacks Law Dictionary* 1145 (7<sup>th</sup> ED. 1999), defined the term "prevailing party" as "[A] party in

<sup>&</sup>lt;sup>4</sup> The Acting General Counsel does not dispute, and I find, that the complaint allegation regarding the discharge of Placeres constitutes a significant and discrete portion of the unfair labor practice proceeding.

5 whose favor a judgment is rendered, regardless of the amount of damages awarded . . ." *Buckhannon Board & Care Home*, supra at 603.

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Applying the definition of a prevailing party utilized by the Court in *Buckhannon*, it is my view that the Respondent is the prevailing party in the instant case within the meaning of the Board's Rules and Regulations and the EAJA. The Respondent was the proponent of the dismissal of the complaint allegation regarding the discharge of Placeres on the basis of the non-Board settlement between it and Placeres. The Acting General Counsel opposed my approval of the non-Board settlement between the private parties. Since I agreed with the Respondent's position that the non-Board settlement should be approved and the complaint allegation regarding Placeres be dismissed on that basis, it appears clear that the Respondent is the prevailing party with respect to this issue.

Whether the Acting General Counsel's Position was Substantially Justified

A prevailing party under the EAJA will not be entitled to its attorney's fees and expenses if the General Counsel's position was "substantially justified." NLRB Rules and Regulations Section 102.144(a). The burden of proof in demonstrating "substantial justification" is on the General Counsel. Id.

In *Galloway School Lines*, 315 NLRB 473 (1994), the Board indicated the following with respect to the substantial justification test:

In order to determine whether the General Counsel has satisfied this test, it is necessary first to identify what constitutes substantial justification. The Board has stated that substantial justification does not mean substantial probability of prevailing on the merits, and that it is not intended to deter the agency from bringing forward close questions or new theories of law. The Supreme Court has defined the phrase "substantial justification" under EAJA as "justified to a degree that could satisfy a reasonable person" or having a "reasonable basis both in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). Thus, in weighing the unique circumstances of each case, a standard of reasonableness will apply. [footnotes omitted.]

See also Meaden Screw Products Co., 336 NLRB 298, 300 (2001).

In order to determine whether the Acting General Counsel's position was substantially justified regarding the litigation of the complaint allegations regarding Placeres it is necessary to set forth some of the procedural history of the case. On April 20, 2010, Placeres filed the charge in 08-CA-038901 alleging that he was discharged in violation of Section 8(a)(3) and (1) of the Act. On September 28, 2010, Charging Party Porter filed the charge in 08-CA-039168. On November 23, 2010, the Acting General Counsel issued an order consolidating cases, amended consolidated complaint and notice of hearing in those cases. Thereafter, Charging Party Fannin filed the charge in 08-CA-039297 on January 5, 2011, and amended charge was filed in that case on June 21, 2011. Charging Party Williams filed the charge in 08-CA-039334 on February 9, 2011. Charging Party Fannin filed the charge in 08-CA-039388 on March 18, 2011. On June 24, 2011, the Acting General Counsel issued an order consolidating cases, second amended

consolidated complaint and notice of hearing (the complaint) in these cases. A trial was held regarding the allegations of the complaint on October 11, 12, and 13, 2011, and I issued a decision in the matter on December 28, 2011. On September 21, 2012, the Board issued its Decision and Order adopting my decision with additional rationale.

In the instant case, as noted above, I dismissed the complaint allegation regarding the April 13, 2010, discharge of Placeres based on the non-Board settlement that Placeres and the Respondent entered into. While there is no signed agreement between Placeres and the Respondent, the record established that the two parties agreed that Placeres would be reinstated to his former position, the noncompetition agreement that he had previously signed would not be operative and that Placeres would not receive any backpay. In exchange, Placeres would submit a withdrawal of the unfair labor practice charge that he filed in 08-CA-038901.

In March 2011, Placeres was reinstated and on April 8, 2011, the Respondent sent a letter stating that it would not enforce the noncompetition agreement that he had previously signed. On July 26, 2011, Placeres submitted his first withdrawal request to the Regional Director for Region 8. When the Regional Director failed to prove his withdrawal request, on September 11, 2011, Placeres submitted a second withdrawal request, which the Regional Director again refused to approve. At the hearing held in this matter in October 2011, counsel for the Acting General Counsel represented that Placeres was due approximately \$20,000 in backpay if it was established that he was discharged in violation of the Section 8(a)(3) and (1) of the Act.

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Over the objection of the Acting General Counsel, I approved the withdrawal request of Placeres relating to the allegations of the complaint regarding his alleged unlawful discharge and dismissed that portion of the complaint. <sup>5</sup> In approving Placeres' withdrawal of the charge relating to the allegations involving his discharge, I applied the standards set forth in *Independent Stave*, supra. In *Independent Stave*, the Board indicated that it would examine all of the surrounding circumstances to determine whether a non-Board settlement should be approved including but not limited to:

(1) whether the charging party(ies), the respondent(s), and any of the individual discriminatee(s) have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement agreement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of litigation; (3) whether there has been any fraud, coercion or duress by any of the parties in reaching the settlement; and (4)

whether the respondent has engaged in a history of violations of the Act or has breached settlement agreements resolving unfair labor practice disputes.[Id. at 743.]

The Acting General Counsel concedes that both Placeres and the Respondent agreed to be bound by their private agreement and that there was no evidence of fraud, coercion or duress in reaching that agreement. The Acting General Counsel contends, however, that he was substantially justified in opposing the non-Board settlement between Placeres and the

<sup>&</sup>lt;sup>5</sup> I did not approve the withdrawal of the entire charge in Case 08-CA-038901 because the charge also supported a complaint allegation regarding a threat made to another employee.

Respondent because his position was reasonable considering the nature of the violation alleged, the risks inherent to the litigation and the stage of litigation when his opposition to the settlement was asserted

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The complaint allegation that Placeres was discharged in violation of Section 8(a)(3) and (1) was grounded on the theory that the Respondent terminated Placeres because he was seeking assistance from the Union in connection with a dispute over pay he was having with the Respondent. The Acting General Counsel contends that the Board has noted the "serious nature of an 8(a)(3) violation" in determining whether it is appropriate to approve a non-Board settlement. *Frontier Foundries, Inc.*, 312 NLRB 73, 74 (1993). The Acting General Counsel alleges that the remedy for such a serious violation requires something close to complete remedy and that the settlement in the instant case did not provide for such a remedy. The Acting General Counsel argues that the complaint allegation regarding the discharge of Placeres involved the normal risks of litigation

The Acting General Counsel further contends that he was also reasonable in opposing the settlement given the stage of the litigation. In this connection the Acting General Counsel notes that in *Independent Stave*, supra, the settlement was reached 10 days after the issuance of a complaint. In the instant case, the agreement to resolve the charge that Placeres filed was not reached until nearly a year after the termination and 10 months after the Acting General Counsel had issued the first complaint in the matter. The Acting General Counsel notes that in the period between the alleged unlawful discharge of Placeres and the Respondent's offer to settle his case four other charges were filed against the Respondent involving allegations of threats and discrimination in violation of Section 8(a)(4), (3), and (1).<sup>6</sup> In the Acting General Counsel's view, opposition to a non-Board settlement without a notice to employees informing them of their statutory rights was reasonable in this context.

In my decision on the merits of this case, I acknowledged that the allegation that the Respondent violated Section 8(a)(3) and (1) of the Act in discharging Placeres was indeed a serious allegation but that, in my view, the most critical factor in deciding to settle a case are the risks inherent litigation. If the Acting General Counsel had proved at the trial that Placeres was, in fact, discharged in violation of Section 8(a)(3) and (1) he would be entitled to a full remedy, including backpay and the posting of a notice. The trial revealed, however, a substantial weakness in the Acting General Counsel's case when the facts surrounding the departure of Placeres from the Respondent's employ were examined. The resolution of the question of whether Placeres was unlawfully discharged in violation of the Act, in my view, depended in large measure upon which version of the facts surrounding Placeres' departure from the Respondent's employment on April 13, 2010 was more credible.

According to Placeres, he called the Respondent's office from a jobsite and spoke to the office manager. Placeres testified that he told the office manager that money had been taken out of his paycheck and that he needed to speak to either the Respondent's president or vice president. Placeres testified that he also asked the office manager for the telephone number of the Union. Placeres testified that he called the office later in the day and spoke to Brian Singleton, an

<sup>&</sup>lt;sup>6</sup> In my initial decision I found a number of the complaint allegations based on these newly later filed charges to have merit.

acknowledged supervisor. According to Placeres, when he told Singleton that he wanted to speak with the president or vice president, Singleton replied that they had already given him the reason for the deduction and that Placeres was not in the Union so he could not call it. Placeres further testified that at the end of the workday on April 13, 2010, Singleton arrived at the jobsite that Placeres was working on and informed him that he was fired. When Placeres asked Singleton why he was being fired, Singleton said that he was "following orders from the owners." On direct examination, however, Placeres admitted that he did not know if he understood correctly what Singleton had said to him. On cross-examination, Placeres reiterated that he may have misunderstood what Singleton said to him because his English was not very good and that he was upset when this conversation occurred.

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The Respondent's primary defense to the allegation that Placeres was discharged in violation of Section 8(a)(3) and (1) for attempting to enlist the Union's aid in assisting him with his pay dispute, was the testimony of Singleton. In this connection, Singleton testified that Placeres was not in fact discharged but rather quit his employment in anger after misunderstanding Singleton's explanation of the wage rate he was being paid on the job he was working at.

As noted above, on both direct and cross-examination, Placeres admitted that he may have misunderstood what Singleton said to him on April 10, 2010. After observing Placeres at the trial and considering the substance of his testimony, I had substantial doubts about his credibility as a witness regarding certain key facts involving his alleged unlawful discharge. Ultimately, it was my concern about Placeres' reliability and the consequent weakness of the Acting General Counsel's case regarding his discharge that led me to the conclusion that it was appropriate to approve the non-Board settlement between Placeres and the Respondent. My conclusions regarding the unreliability of certain aspects of Placeres' testimony does not establish it was unreasonable for the Acting General Counsel to continue to litigate the allegations of the complaint regarding his discharge at the trial.

As the Board noted in *David Allen Co.*, 335 NLRB 783 (2001):

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Credibility issues which are not subject to resolution by the General Counsel in the investigative stage of proceeding on the basis of documents or other objective evidence are, in the first instance, the exclusive province of the administrative. law judge. Accordingly, where the General Counsel is compelled by the existence of a substantial credibility issue to pursue litigation, and thereafter presents evidence which, if credited, would constitute a prima facie case, the General Counsel's case has a reasonable basis in law and fact and is substantially justified. *Barrett's Contemporary & Scandinavian Interiors*, 272 NLRB 527 (1984). [Id. At 785-786.]

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See also Golden Stevedoring Co., 343 NLRB 115 (2004).

<sup>&</sup>lt;sup>7</sup> At the trial, Singleton specifically denied that Placeres had asked him for the Union's phone number.

Had I found Placeres to be a more credible witness I may have concluded that the Acting General Counsel had supported the allegation in the complaint regarding his discharge by a preponderance of the evidence. If that were the case, in view of the other unfair labor practices committed by the Respondent, I might have determined that the Acting General Counsel's objection to my approval of the settlement was well taken. Since my view regarding the credibility of Placeres played an important role in deciding to approve the non-Board settlement between him and the Respondent, I conclude that the Acting General Counsel's decision to oppose the non-Board settlement and litigate the issue of Placeres' discharge to be substantially justified as it met the standard of reasonableness that is the touchstone in determining cases involving an application for fees under the EAJA.

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In view of my conclusion that the Acting General Counsel's position was substantially justified with regard to the complaint allegation regarding the discharge of Placeres, I need not decide whether the Respondent's application should be dismissed because it did not properly itemize expenses and was not initially served on all parties to the litigation.

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Having concluded that the Acting General Counsel has met the burden of proving that his position in this proceeding was substantially justified with respect to the allegation in the complaint regarding the discharge of Placeres, I issue the following recommended<sup>8</sup>

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#### **ORDER**

The Acting General Counsel's motion to dismiss the Respondent's application is granted and the Respondent's application for an award of allowable fees and expenses is hereby dismissed.

Dated, Washington, D.C., February 4, 2013.

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Mark Carissimi
Administrative Law Judge

<sup>&</sup>lt;sup>8</sup> If no exceptions are filed as provided by Sec. 102.154 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.